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No. 90-754

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CALVIN J. PERKINS,

Petitioner,

v.

FARM CREDIT BANK OF WICHITA, KATHERINE A. WUNDERLICH, RODNEY C. CLASS-ERICKSON AND CHERYL L. CLASS-ERICKSON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RODNEY AND CHERYL CLASS-ERICKSON IN OPPOSITION

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QUESTION PRESENTED

Is there an implied private right of action to enforce the provisions of the Agricultural Credit Act of 1987, 12 U.S.C. § 2219a *et seq.*?

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STATEMENT OF THE CASE

The Petitioner, Calvin Perkins ("Perkins"), owned approximately 9,200 acres of agricultural land in Archuleta County in southern Colorado. Petitioner gave that property as collateral for loans from the Respondent, Farm Credit Bank of Wichita ("FCB"). After Petitioner defaulted on his loans from FCB, FCB filed a judicial foreclosure action in Colorado state court. The state court action ended in a decree of foreclosure on May 27, 1987, affecting all of Mr. Perkins' 9,200 acres. After Petitioner's subsequent bankruptcy proceedings were dismissed, a sheriff's sale of the property was held on March 28, 1989, under Colorado state law. FCB received certificates of purchase to various parcels of Petitioner's property. Under Colorado law, a certificate of purchase conveys title to real property subject to a statutory redemption right, during which the debtor can re-acquire the property by paying the debt. Petitioner's right of redemption ended on September 28, 1989. Mr. Perkins never exercised his right of redemption.

Before the expiration of Mr. Perkins' right of redemption, FCB sold a certificate of purchase for a parcel of the property to the Respondents, Rodney and Cheryl Class-Erickson, and certificates of purchase to two parcels to the Respondent, Katherine Wunderlich. Under Colorado law, after Petitioner's redemption right expired, the certificates of purchase in the hands of FCB, the Class-Ericksons, and Mrs. Wunderlich ripened into fee title.

In November 1989, Petitioner attempted to assert a private action under the Agricultural Credit Act of 1987 (the "Act"), in which he sought injunctive relief and

damages against FCB, and also sought declaratory relief to invalidate the transfers of property to the Class-Ericksons and Mrs. Wunderlich. The various claims were premised on the alleged failure of FCB to comply with one part of the Act which requires the farmer-debtor to be given a right of first refusal to reacquire property foreclosed on by a Farm Credit System Bank. The Honorable Jim R. Carrigan, United States District Court for the District of Colorado, dismissed that action by Order dated March 16, 1990, on grounds no implied private right of action exists under the Act. The Court of Appeals for the Tenth Circuit affirmed that Order on August 17, 1990.

ARGUMENT

NO GROUNDS EXIST FOR GRANTING CERTIORARI

A. No conflict exists among the circuit courts who have expressly considered the issue before the Court

Three Circuit Courts of Appeal have considered the issue presented by the Petition. The Ninth, Tenth and Eighth Circuits have concluded without exception that no implied private right of action exists under the Act. *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), *cert. denied* 110 S.Ct. 867 (1990); *Griffin v. Federal Land Bank of Wichita*, 902 F.2d 22 (10th Cir. 1990); *Zajac v. Federal Land Bank of St. Paul*, 909 F.2d 1181 (8th Cir. 1990).

Petitioner asserts that there "appears" to be an "implicit" conflict among the circuits on this issue. In support, he cites two decisions: an earlier decision of a

panel of the Eighth Circuit in *Zajac* (reported at 887 F.2d 844 (1989)) in which an implied private right of action was recognized, and *Payne v. Federal Land Bank of Columbia*, 916 F.2d 179 (4th Cir. 1990). Neither decision creates the conflict posited by Petitioner, and neither justifies the extraordinary remedy of certiorari.

The earlier opinion in *Zajac* relied on by Petitioner was withdrawn and reversed by the Eighth Circuit acting *en banc*. It is bizarre to argue, as Petitioner does, that an "implicit" conflict was created by a decision that was expressly overturned, *en banc*, by the very circuit court whose panel originally issued it. It is, however, consistent with Petitioner's theory as to legislative intent. For just as Petitioner argues that a conflict is created among the circuits by an Eighth Circuit panel opinion that was later withdrawn and overturned by the Eighth Circuit *en banc*, he argues that despite the fact that Congress included a private right to sue in drafts of the Act, but then deleted those rights from the final bill, Congress implicitly intended that such rights exist. Both arguments are circular and fall of their own weight.

Nor is a conflict created by the *Payne* decision. There is nothing in that opinion, or indeed in the decision of the District Court below (reported at 711 F.Supp. 851 (W.D. N.Car. 1989)), to indicate that the issue of an implied private right of action was ever raised or considered by those courts. The Fourth Circuit has thus never directly decided that an implied private right of action exists, and so has not rendered an opinion in conflict with the three circuits that have ruled no such action exists. The mere fact that the *Payne* decision discusses remedies available

to farmer-borrowers, without considering the initial jurisdictional issue involved here, does not create the conflict among circuits sufficient under Sup. Ct. R. 10.1(a) to invoke certiorari.

Finally, no conflict among the circuits is created by the dissent from the *en banc* opinion in *Zajac*. First, the mere fact that a minority of judges on one circuit dissents on an issue does not meet the standards for certiorari in Sup. Ct. R. 10.1 (a), especially where the formal decisions of all circuit courts are in agreement on the issue. Second, even the dissenting opinion of Judge Heaney in *Zajac* would not support an implied private action in the circumstances of the case at bar. In Judge Heaney's dissent, he was careful to point out that he would support a private action under the Act only where injunctive relief was sought to compel prospective compliance with the procedures created by the Act. *Zajac* at 1196. In this case, by contrast, Petitioner does not seek merely injunctive relief to enforce compliance with the Act's procedures. Instead, Petitioner wishes to assert a private action for damages against the FCB, and seeks to invalidate title to real property in the hands of remote grantees, such as the Class-Ericksons and Mrs. Wunderlich. No decision, not the limited opinion in *Payne*, not the withdrawn panel opinion in *Zajac*, not the dissent from the *en banc* opinion in *Zajac*, would support an implied private action of the sort Petitioner wishes to assert here. Indeed, of all of the cases that have been decided thus far by courts of appeal under the Act, the case at bar is the most far-reaching in its implications for the Farm Credit System as a whole, and also seeks sanction for the most extensive federal intrusion possible into areas traditionally relegated to

state law: i.e., title to real property and restraints on the free alienation of real property, to name but a few.

Just this year this Court refused to grant certiorari in *Harper*, where the action by the farmer-borrower sought only a temporary injunction to prevent completion of a foreclosure pending compliance with the debt-restructuring provisions of the Act. If certiorari was not appropriate in *Harper*, it is singularly inappropriate in this case, where the farmer-borrower seeks to assert a private action with such profound and unsettling implications for areas of traditional state concern.

B. The Decision of the Tenth Circuit is correct and does not merit review by this Court

Petitioner seeks to invoke certiorari under Sup. Ct. R. 10.1(c), by arguing that the Tenth Circuit's decision ignores the intention of Congress that an implied private right of action exist under the Act, and this Court should therefore decide this important federal question. There is no merit to this argument, particularly in this case.

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), establishes four tests for implied private rights of action under federal statutes: first, is the plaintiff one of the class for whose special benefit the statute was enacted?; second, is there any indication of congressional intent either to create or to deny such a remedy?; third, is inferring a private right of action consistent with the underlying purposes of the act?; and fourth, is the claim asserted traditionally relegated to state law, so that it would be inappropriate to confer a cause of action based solely on federal law? This Court's decisions after *Cort*

have emphasized the decisive importance of the third factor in the *Cort* analysis. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 105 S.Ct. 3085, 3092, 87 L.Ed. 2d 96 (1985); *Thompson v. Thompson*, 484 U.S. 174, 179, 108 S.Ct. 513, 516, 98 L.Ed.2d 512 (1988) (no private remedy will exist if evidence of congressional intent cannot be found or inferred from the structure of the act or some other source). A review of available evidence of congressional intent indicates that the Tenth Circuit decision was correct and is not appropriate for review by certiorari.

A review of the Act itself creates no inference of an intent that private actions be permitted to enforce it. As the Ninth Circuit in *Harper* found, Congress created an elaborate administrative scheme to implement the Act. In the absence of strong contrary congressional intent, the necessary conclusion is that Congress, by creating an administrative enforcement scheme, provided precisely the remedies it considered appropriate. *Harper* at 1176, quoting from *Middlesex County Sewerage Auth. v. National Sea Clammers Assn*, 453 U.S. 1, 14-15, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1981). No strong contrary evidence of congressional intent exists.

First, as Petitioner himself concedes, during consideration of the Act, an express private right of action was proposed in both houses of Congress. The fact that these were dropped from the final Act as passed creates, at the least, an inference that Congress did not include such private rights because it did not desire such private actions to enforce the Act. Despite this, Petitioner argues that isolated statements (well before the Act reached its final form) by a few legislators establish an intention that a private action be permitted, because these members of

Congress mistakenly thought private rights of action were permitted under earlier law. S. 1665, 100th Cong., 1st Sess., 133 Cong. Rec. 16993, 16995 (December 2, 1987). However, as the Eighth Circuit recognized in *Zajac*, a conference committee report represents a statement on the final terms agreed to by both houses of Congress, and next to the statute itself, it is the single most persuasive source of congressional intention. *Zajac* at 1182. There is nothing in the conference committee report leading up to the Act which indicates that the committee gave any weight to the statements made on the floor by members about their mistaken impression of the availability of private actions. Indeed, the conference committee report states only that the committee chose to delete the private right of action provisions from the final bill. See H.R. Conf.Report No. 100-490, 100th Cong., 1st Sess., 178. reprinted in 1987 U.S. Code Cong. & Admin. News 2723, 2973. Under these circumstances, as the Ninth Circuit recognized in *Harper*:

> "To permit what we regard as clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President."

878 F.2d at 1176, quoting *Regan v. Wald*, 468 U.S. 222, 237, 104 S.Ct. 3026, 3035, 82 L.Ed.2d 171 (1984).

Further, even if the dubious premise were accepted that statements on the House and Senate floor concerning private rights to sue were deemed appropriate guideposts of the intent of the full Congress, the reasonable conclusion from the available evidence does not support

the interpretation advanced by Petitioner. It was well settled that no implied private right of action existed under the statutes and regulations in force before the 1987 Act. See, *Harper* at 1175 and cases cited therein. At the same time, state courts recognized pre-Act statutes and regulations as effective affirmative defenses in state court foreclosure actions. See, e.g., *Federal Land Bank of St. Paul v. Overboe*, 404 N.W.2d 445 (N.D. 1987). Certainly, the normal rule of statutory construction is that if Congress intends legislation to change the interpretation accorded by the judiciary, it makes that intention specific, and otherwise accedes to the pre-existing judicial interpretation. *MidAtlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 501, 106 S.Ct. 755, 759, 88 L.Ed.2d 859 (1986). Here, the conference committee report contains no expression of intent to favor additional private rights of action beyond those already recognized in the case law. As a consequence, the reasonable presumption is that the Congress, if it considered the issue at all, favored those private actions recognized in existing case law (i.e., the assertion of the mandatory requirements of the Act as affirmative defenses in state foreclosure actions). The deletion in conference committee of any provision for federal jurisdiction over such private actions militates against any broader interpretation of the intention of Congress, such as that advanced here by Petitioner.

In addition, the early legislative history on which Petitioner relies also contains evidence that Congress never favored private rights of action for the very type of claims Petitioner asserts here against the Class-Ericksons and Mrs. Wunderlich. Senate Report 100-230 dealt with

one of the early versions of the Act upon which Petitioner bases his claim of congressional intent. In that report, the Senate Committee on Agriculture, Nutrition and Forestry stated as follows concerning the farmer-borrower's right of first refusal:

> These rights of first refusal are not, in any manner, intended to impair or encumber the marketability of such land – thus they should not be read to mean that clear title could ever be impaired or clouded by non-compliance with those provisions. . . . Of course, failure of System institutions to comply with these requirements could result in liability to the previous owner, but will not cloud the title to that land. . . .

Sen. Rep. 100-230, p. 35, 100th Cong., 1st Sess. The claims Petitioner seeks to assert against FCB, the Class-Ericksons and Mrs. Wunderlich attempt to impair and encumber the title and marketability to their land. Thus, even if Petitioner were right that some of the Act's early legislative history might favor implied private rights of action, that history is clear that Congress never intended private actions such as Petitioner wishes to pursue. Thus, even if Petitioner's argument about congressional intent were otherwise valid, it is clear that this case is not an appropriate candidate for certiorari even under a reading of legislative intent most sympathetic to Petitioner.

One additional part of the *Cort* test that Petitioner cannot show is that the action he seeks to pursue is not one traditionally relegated to state law. Contrary to Petitioner's argument, the action he asserts is one in the nature of a quiet title decree for real property. In the case of the Class-Ericksons and Mrs. Wunderlich, Petitioner

seeks declaratory relief to invalidate fee title to real property in their hands, and in the case of FCB, he seeks to encumber or impair the marketability of fee title in its name. Clearly, such an action touches upon one of the most central concerns of state law – governance of the ownership of private property within its boundaries, the encumbrance of the title to such land, and potential restraints on the free alienation of land within the state's boundaries. These are among the oldest aspects of property law traditionally relegated to state control. To permit Petitioner to assert such an action would sanction the most intrusive federal intervention possible into a traditional area of state concern. For this reason alone, the Tenth Circuit's holding was correct under *Cort*, and the Petition must be denied.

CONCLUSION

The issue of whether the Act contains an implied private right of action is one on which the courts of appeal have been in agreement. It is also one in which the structure of the Act itself, and the conference committee reports (which are the most relevant legislative history next to the Act), strongly support the propriety of the Tenth Circuit decision. Finally, the action Petitioner wishes to pursue is one Congress plainly would not have favored even under Petitioner's own legislative history analysis, and it would involve a broad and far-reaching intrusion into the governance of title to and ownership of real property, which is an area of strong and central concern to the states. For all of these reasons, these

Respondents request that the petition for certiorari be denied.

Respectfully submitted,

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